No. 82-2056

IN THE

Supreme Court of the United States

October Term, 1983

ESCONDIDO MUTUAL WATER COMPANY, *et al.*,

Petitioners,

vs.

LA JOLLA BAND OF MISSION INDIANS, *et al.*,

Respondents.

On Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONERS' REPLY BRIEF.

PAUL D. ENGSTRAND,
DONALD R. LINCOLN,
HENRY E. HEATER,
JENNINGS, ENGSTRAND & HENRIKSON,
A Professional Law Corporation,
2255 Camino del Rio South,
San Diego, Calif. 92108,
(619) 291-0840,

JOHN R. SCHELL,
KENT H. FOSTER,
GLENN, WRIGHT, JACOBS & SCHELL,
2320 Fifth Avenue, Suite 300,
San Diego, Calif. 92101,
(619) 289-1211,

C. EMERSON DUNCAN II,
DUNCAN, ALLEN & MITCHELL,
1575 Eye Street, N.W., Suite 300,
Washington, D.C. 20005,
(202) 289-8400,

Attorneys for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622.

Questions Presented.

1. Does the Act of January 12, 1891, 26 Stat. 712, MIRA[1] permit the Mission Indian Bands to veto the Commission's decision to relicense a federal power project by withholding consent to the continued use of reservation lands?

2. Does section 4(e) of the Federal Power Act permit the Secretary of the Interior to veto the Commission's decision to relicense a federal power project by imposing unreasonable conditions on the continued use of reservation lands?

3. Are Indian "water rights" a "reservation" within the meaning of section 4(e) of the Federal Power Act?

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[1] "MIRA" refers to the Mission Indian Relief Act.

References to the record are abbreviated per Petitioners' initial brief. (PB 1 n.2) Other briefs are abbreviated: Interior (IB), Bands (BB), Commission (FERC B), American Public Power Ass'n, *et al.* (APPA B), Edison Electric Inst. (EEI B), and National Wildlife Ass'n, *et al.* (NWF B).

All section references are to the Federal Power Act (FPA); parallel U.S. Code citations are in the Table of Authorities.

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STATEMENT OF THE CASE.

Several of Respondents' statements, while technically correct, are misleading because relevant facts are omitted.[2] Respondents'

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[2]Interior states that no project water has been delivered to certain reservations. (IB 6) It omits that: La Jolla never has been irrigated from the river (PA 48); future irrigation development on it would be extremely difficult (PA 177); San Pasqual is partly outside the San Luis Rey watershed, has no irrigated farming, and, obtains its water from other sources. (PA 49, 178) It omits that Pala and Pauma receive substantial runoff below the Escondido diversion (See Test. of Bands' Witness Stetson, NJA 2140-41); Pauma's historic source of water is a downstream tributary, Pauma Creek (COR 4596-97); and except for 160 acres, all of Pala was added after Escondido commenced diversions. (NJA 2546-54)

The statement that Petitioners have alternative water supplies (IB 6) incorrectly implies that the Bands could not also have alternative sources. (See COR 5631, 5646, 5767; see also remarks of ALJ Ellis, COR 5784)

Interior states that except for San Pasqual no Band received compensation for the use of its land. (IB 6) It disregards other benefits: flood control protection provided by Henshaw Dam (NJA 3207, 3210-11); releases of water which permit the existing recreational development on La Jolla (NJA 3209-10); water deliveries to Rincon where it can be used directly for irrigation (NJA 3211-12); and, power deliveries to Rincon for pumping purposes at extremely low rates. (NJA 3211-12) In fact, until 1957, when three acres of additional San Pasqual land was used, Interior always told the Commission that additional annual charges were unnecessary because the license incorporated the 1914 contract. (*See* PB 25)

one-sided[3] description of the alleged "plight" (IB 2-3) and "historical nightmare" (BB 10) of the Bands' ancestors should not color the Court's consideration of the issues. Little is gained from a debate about what living conditions and cultural patterns existed a century ago; nothing suggests that Project 176 has caused or will cause any detriment to the Bands.[4]

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[3]During House debate on MIRA Congressman Vandever (who represented the district where the Mission Indians lived, 22 Cong. Rec. 310 (1890)) gave another view of this "plight." He discounted as fanciful, Helen Hunt Jackson's accounts, and noted that most of the bill's proponents lacked first-hand knowledge. (*Ibid.*) Although stating: "I have no disposition to do these Indians a wrong" (*Ibid.*), he adduced facts which showed that many of the Indians' problems were self-inflicted. (*Id.* at 310-11)

Support for his view is contained in the August 17, 1887 Report of the Mission Indian Agent (*See* House Report Ex. Doc. 45, 50th Cong., 1st Sess. (December 24, 1887) Report of the Secretary of Interior, vol. 2 (1887-88), 91-94). In contrast to the Report cited by the Bands (BB 13 n.6), this agent reported that the Indians were neither industrious nor self-reliant. (*Id.* at 92) He also minimized the trespasser problem (BB 7 n.1 and 11 n.5), stating:

> "Although there have been many trespassers on their lands yet there is not a single industrious Indian who has not been able to get more land than he could cultivate . . . ." (*Id.* at 91)

[4]The Commission noted:

> "The Rincon, Pauma and Pala Indian Reservations overlie . . . underground storage reservoirs providing year-round sources of water . . . [that] always [have] been and still [are] equally available to those Bands and to their neighboring landowners, [who] have developed their citrus and avocado orchards notwithstanding the diversion of the San Luis Rey water for more than a half-century. . . . [T]he fact that the . . . Bands have not developed their reservations to the same extent as their non-Indian neighbors, indicate . . . that the Bands are not now prepared to carry out their ambitious agricultural program and take on the responsibilities of Project No. 176. While their reservations are barren, *it is not because Project No. 176 has deprived them of water.*" (emphasis added unless otherwise indicated) (PA 122; see also JA 47-48, and 69 (Test. of Bands' Witness Stetson and Interior Witness Kunkle that water had always been available)

ARGUMENT.

I.

INDIAN CONSENT IS NOT REQUIRED FOR THE USE OF RESERVATION LAND FOR FEDERAL POWER PROJECTS.

The issue of Indian consent cannot be resolved by relying on generalized notions of Indian sovereignty. (BB 35-39, 46; IB 42) The key inquiry is what was Congress' intent.[5]

A. The FPA Does Not Require Such Consent.

The FPA expressly provides for the incorporation of Indian lands into federal power projects. (*See* §§3(2), 4(e), 10(e), 10(i) and 17(a); PB 12-14) As Judge Anderson concluded below: "I cannot conceive of a more direct and specially tailored scheme for the appropriation of Indian lands than the FPA." (PA 36)

Congress debated and rejected an amendment to the FPA that would have required Indian consent to the use of their lands.[6] (See PB 14-18) Respondents downplay this striking evidence of Congressional intent by dismissing the remarks of individual senators as not probative, insisting that the conferees' report is "the most persuasive evidence of Congressional intent." (BB 44 n.28; IB 40 n.56) They fail to note that two of the five Senate conferees, Meyers and Nelson (*see* H.R. Rep. No. 910, 66th Cong., 2d

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[5]To determine its intent, "the face of the Act," the "surrounding circumstances", and the "legislative history" must be examined. *Rosebud Sioux Tribe v. Kneip* (1977) 430 U.S. 584, 587. Other indicia of intent are administrative interpretations of the statute by those charged with its implementation (*Chemehuevi Tribe of Indians v. Federal Power Comm'n* (1975) 420 U.S. 395, 409-10) and subsequent legislation. *Solem v. Bartlett* (1984) ___ U.S. ___, 52 U.S.L.W. 4257, 4259.

[6]Interior's argument that section 4(e) incorporates MIRA section 8's "consent" requirement (IB 49) is illogical. After deleting an Indian consent proviso in 4(e), Congress could not have intended that section 4(e) would nevertheless impliedly incorporate such consent. The lack of a consent requirement has not rendered section 4(e) meaningless because the Commission has refused to license projects that substantially physically intrude on a reservation. (PB 19-20) Here, as the Bands ironically concede, the "encroachments" are on their "mountain land [which is] worthless for any purpose . . . ." (BB 9)

Sess. (1920) at 8), strenuously opposed the Indian consent amendment during debate.[7]

Contrary to the Bands' implication (BB 44), the senators were familiar with court decisions respecting Indian sovereignty, and understood that Congress had plenary power over Indian lands and could dispose of them without Indian consent. (*See, e.g.*, 59 Cong. Rec. at 1565 (remarks of Curtis: "[T]he Supreme Court has decided that the Congress has the right to pass laws disposing of [Indian] property without their consent . . . ."); *Id.* at 1569 (remarks of Nugent: "I am somewhat familiar with the decisions of the Supreme Court . . . referred [to] yesterday, [including] . . . the Cherokee Tobacco case,[8] . . . Thomas against Gay[9] and . . . Lone Wolf against Hitchcock.")[10] Senator Curtis even closed the debate on the amendment by quoting from *Lone Wolf*. (PB 16)

The conferees' statement that they "saw no reason why water power should be singled from all other uses of Indian reservation land for special action of the council of the tribe" (H.R. Rep. No. 910, *supra* at 8) merely reflects their knowledge that after *Lone Wolf*, *supra*, Congress had plenary power to dispose of

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[7]*See, e.g.*, 59 Cong. Rec. 1534 (1920) (remarks of Nelson: "I do not believe in that amendment. It would allow a few Indians to hold up an improvement . . . ."); *Id.* at 1565 (remarks of Meyers: "If this amendment becomes a law, . . . Indians [could] arbitrarily . . . block a [power project] . . . . They would have an absolute power of veto.") Thus, contrary to the Bands' assertions (BB 44), at least two of the conferees stated that an Indian consent requirement would be inconsistent with the FPA and that Indian interests should be subordinate to power development.

[8]In *The Cherokee Tobacco* (1871) 78 U.S. (11 Wall.) 616, the Court held that a general federal revenue act superseded earlier Indian treaty rights.

[9]In *Thomas v. Gay* (1898) 169 U.S. 264, the Court held that the act creating the territory of Oklahoma prevailed over the provision of an Indian treaty.

[10]In *Lone Wolf v. Hitchcock* (1903) 187 U.S. 553, the Court held that Congress had plenary power to dispose of Indian lands without their consent in abrogation of a prior treaty.

Indian lands for any purpose without their consent.[11] Under the circumstances they saw no need to single out water power purposes for different treatment.[12]

The amendment's failure does not mean that it should be ignored. (*See, e.g., Chemehuevi, supra*, 420 U.S. at 410 (In deciding that FPA was not intended to give Commission jurisdiction over thermal power plants the Court noted that later Congresses had refused to amend the act to include such licensing authority).) The significance of the amendment's failure was not lost on its sponsor, Senator Nugent, who recognized that without it "the water power commission will have authority to take from these Indians the lands ceded to them by the United States by treaty without their consent . . . ." (59 Cong. Rec. 1566.)

Congress' intent also is evidenced by its action on a contemporaneous bill which became the Crow Allotment Act of June 4, 1920, 41 Stat. 751. At one time section 10 of the bill required Indian consent to the leasing of water-power sites on tribal lands.[13] Senator Meyers opposed the consent requirement:

> "When it comes to . . . lands . . . valuable for water-power development, I do not believe that their disposition ought to be controlled by Indians . . . . I do not believe that they ought to have the power to veto any disposition of those lands and lock up their possibilities forever." (58 Cong. Rec. 7175)

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[11]This interpretation is consistent with remarks made during the amendment's debate with at least two of the Senate conferees present. (See, *e.g.*, 59 Cong. Rec. at 1568 (remarks of Senator Walsh: "[S]ince that decision of the Supreme Court [in *Lone Wolf*], Congress has acted on it and disposed of lands within Indian reservations as in its wisdom seemed best.")).

[12]Congressional knowledge of *Lone Wolf* has been held significant in determining Congressional intent. (See, *e.g., Solem v. Bartlett, supra*, 52 U.S.L.W. at 4259 n.11; *Rosebud Sioux Tribe v. Kneip, supra*, 430 U.S. at 668 n.13 and 669; *Ute Indian Tribe v. State of Utah* (1983 10th Cir.) 716 F.2d 1298, 1310 (In acts passed in 1903 and later, Congress relied on *Lone Wolf* and eliminated requirements of Indian consent in dealing with reservation lands)).

[13]*See* 58 Cong. Rec. 7174 (1919); S. Rep. No. 219, 66th Cong., 1st Sess. (1920) at 3.

Interior also opposed the Indian consent provision.[14] It was omitted from the final Act. (41 Stat. 751)

After the FPA's enactment, Congress twice refused to impose an Indian consent requirement on the use of Indian lands under the FPA. The 1948 general Indian right-of-way act, 25 U.S.C. sections 323-328, expressly exempted the FPA from a tribal consent requirement.[15] (PB 17; 25 U.S.C. 326)

A later attempt to impose a tribal consent requirement on the FPA *failed* when Congress did not act on a 1969 Committee Report (BB 35-36) which recommended that Congress amend the 1948 Act "to require tribal consent to *all* right-of-way grants of tribal land. . . . (H.R. Rep. No. 91-78, 91st Cong., 1st Sess. (1969) 4; see PB 17-18)

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[14]In a letter to the House Committee on Indian Affairs, (quoted in the *1920 FPA debate*) Interior stated:

> "I recommend that [the consent] proviso be eliminated. The interest of the Indians are carefully looked after by this department, and in a matter like water-power development, involving . . . a use of both Indian and public lands in the largest and best water-power development possible, *it should not be necessary that the matter be submitted to the approval of the Indians before water-power development can be secured.*
>
> . . .
>
> The [FPA] . . . provides a general and comprehensive plan for the leasing and development of water-power sites upon . . . Indian reservations . . . . That measure amply takes care of the matter of leasing and use of such sites in Indian reservations, and in my opinion this [Crow] bill should go no further than to reserve the sites and should impose no restrictions or conditions upon the leasing thereof." (59 Cong. Rec. 1564)

[15]The assertion that 25 U.S.C. section 326 only "means that uses of tribal lands for hydroelectric projects cannot be authorized without the Commission's approval" (BB 40 n.24) ignores the section's express purpose of preserving the FPA as right-of-way authority for power purposes. *See* S. Rep. No. 823, 80th Cong., 2d Sess. 4 (1948) (Letter from Interior proposing the language finally enacted and pointing out that it preserves "existing statutory authority relating to rights-of-way over Indian lands.")

The Commission always has interpreted section 4(e) as authorizing it to license the use of Indian lands without their consent.[16] (PB 18) For more than fifty years Interior agreed. (PB 24-25) The Bands ignore this consistent, longstanding interpretation. Interior takes issue with this interpretation only insofar as it is evidence that *MIRA section 8* does not require consent.

B. MIRA Section 8 Does Not Require Such Consent.

MIRA section 8 was not intended to require Indian consent to all uses of their land. (PB 21-22)[17] Thus, to the extent that it was

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[16]The Bands (BB 17-18 and 17 n.9) misread the 1929 Memorandum from Commission Attorney Lawson, concerning a proposal to develop the Flathead power site. At the outset, he explains:

> "There are no *legal* rights of settlers or Indians to be considered, as properly distinguished from *equitable* rights, the power of Congress to do as it pleases with the property of the Indians, despite prior laws and treaties, being incontestible. I therefore deal only with the equities of the settlers and Indians."
>
> "The lands having particular value for power are tribal lands of the Flatland Indians and are subject to the general jurisdiction of the Federal Power Commission to issue licenses under the Federal Water Power Act." (COR 24,401-02) (emphasis in original)

[17]Although MIRA was intended to provide the Bands a permanent home, it was not intended to prevent all encroachments by non-Indians. Section 8's purpose was to permit — not prevent — non-Indians to use the reservations for canal, road and railroad purposes. *See* Senate Ex. Doc. No. 118, 51st Cong., 1st Sess. (1890) which includes a letter from the Commissioner of Indian Affairs stating:

> "The lands set apart and reserved for the Indians ought not to stand in the way of the development and occupations of the surrounding county where no interests of the Indians can be injured thereby." (*Id.* at 11)

MIRA probably would not have passed without section 8. Congressman Vandever (*supra* n.3) originally opposed MIRA (22 Cong. Rec. 311 (1890)) because it did not balance Indian and non-Indian interests. After MIRA was amended to authorize use of Indian lands, Vandever apparently receded from his opposition. (*Ibid.*)

The argument (BB 11 n.5, 13-14) that Congress was skeptical of Interior's ability to protect the Indians and believed that the Indians

(footnote continued on following page)

not superseded or repealed by the FPA[18] or other Indian right-of-way statutes,[19] it is merely an alternative[20] method for obtaining

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should determine whether rights-of-way should be granted is wrong. When Congress passed MIRA section 8, it did not require Indian consultation, much less consent, prior to the issuance of a patent. After issuance of a patent, the operative words are "may contract." Interior, not the Bands, has final authority to approve or disapprove a right-of-way.

Further, the *same* Congress gave Interior unilateral authority to grant rights-of-way across reservations in the Act of March 3, 1891, 43 U.S.C. section 946. (*See Rio Verde Rio Verde Canal Co.* (1898) 27 Int. Land Dec. 421, 425 (Congress did not intend that the intervention of Indian reservations should prevent the construction of canals and ditches to irrigate the arid west)).

[18]The FPA is a complete and self-contained Act for obtaining rights-of-way for power purposes across Indian and other public lands. (PB 30-31) If Petitioners had simply an irrigation canal, and they decided not to proceed under other acts (*e.g.*, March 3, 1891 Act) they may have contracted for a right-of-way with the Bands pursuant to MIRA. Petitioners, however, have a jurisdictional federal power project. They were bound to proceed under the FPA to obtain their right to use the Bands' lands, and they were not required to contract with the Bands or obtain their consent in so doing. (PB 21-22) Contrary to Respondents' assertions (BB 41; IB 49), to the extent MIRA section 8 applies and requires Indian consent it is obviously most "inconsistent" and therefore repealed by section 29. (*See* PB 28-32)

[19]MIRA section 8 was repealed or superseded by the Act of March 3, 1891, and other subsequent general legislation. (*See* PB 22-24) Interior's attempt (IB 47 n.54) to distinguish *Rio Verde Canal Co.*, *supra*, and *United States v. Portneuf-Marsh Valley Irrigation Co.* (1914 9th Cir.) 213 F. 601, is unavailing. There, the Act of March 3, 1891, *supra*, was held to have superseded two treaties which had been confirmed by specific Acts of Congress.

To the extent that the District Court has made contrary interlocutory rulings (IB 4 n.3, 45-46), it erred. Like the Ninth Circuit, it froze time and events as they existed when MIRA was passed and failed to give effect to later Congressional acts which repealed it or provided alternative methods for obtaining rights-of-way across Indian reservations. (PB 23 n.35)

[20]Interior apparently concedes that after enactment of the FPA, MIRA section 8 no longer provided the exclusive method for obtaining rights-of-way across Mission Indian reservations for water conveyance facil-

rights-of-way across Mission Indian lands.

The Bands are unable to distinguish (BB 42 n.26) the cases in which Courts have given effect effect to a statute permitting a right-of-way across Indian lands without Indian or secretarial consent, notwithstanding the existence of another statute requiring such consent. (PB 26-27)

Interior also has interpreted various statutes as alternative means of obtaining rights-of-way across Indian lands. In two unreported cases, *Coachella Valley Ice and Electric Co.* and *Southern Sierra Power Co.*, both discussed in *Icicle Canal Co.* (1916) 44 Int. Land Dec. 511, 512-13, Interior held that two Mission Indian reservations, the Morongo and Cabezon, were "reservations" within the meaning of the Acts of February 15, 1901 (43 U.S.C. 959) and March 4, 1911 (43 U.S.C. 961), and granted rights-of-way across both. Interior apparently viewed the two general right-of-way statutes as either superseding or being an alternative to the more specific MIRA section 8.[21]

Here, both Interior and the Commission have long interpreted MIRA section 8 as not being the exclusive method of obtaining

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ities. (See argument heading IB 43) Instead Interior merely urges that MIRA is the more appropriate statute because "the primary purpose of Project No. 176 is to convey water, not to produce power." (IB 48) The Bands also emphasize that MIRA applies because "[t]he primary purpose of Project No. 176 is the diversion and conveyance of water. . . ." (BB 45) Their argument smacks of an attempt to argue that Project No. 176 is not a jurisdictional power project. They ignore the Ninth Circuit's affirmation of Commission jurisdiction. (PA 12-16)

[21]Interior also relied on the Act of February 15, 1901 in granting Mutual certain rights-of-way in its 1914 contract. (PB 24)

General acts can supersede earlier specific acts. *See, e.g., Apis v. United States* (1898 S.D. Cal.) 88 F. 931, 938 (A special Act permitting Apis to file a claim for the "La Jolla Rancho" held superseded by MIRA even though it did not specifically authorize the creation of the La Jolla Reservation.)

rights-of-way across the Bands' land.[22] (PB 23-26)

The argument (BB 39-40, IB 50) that Petitioners must obtain rights-of-way under both the FPA and MIRA section 8 is illogical. The purposes of the two acts differ. Petitioners need a canal and other rights-of-way for hydropower development — a purpose expressly covered by the FPA but not covered by MIRA section 8. Interior has held that even where two right-of-way statutes apply on their face, an application cannot be made under both, but must be made under the act most consistent with the applicant's purposes. (*See H. W. O'Melveny* (1897) 24 Int. Land Dec. 560)[23]

MIRA and the FPA provide separate procedures and conditions for obtaining rights-of-way across Mission Indian reservations for different purposes. Because Project No. 176 is a power project within the Commission's comprehensive licensing authority, FPA procedures govern (PA 30-32) and Indian consent is not required.

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[22]Interior attempts to blunt the force of this longstanding interpretation by arguing that MIRA section 8 was never considered. Interior is wrong.

During the sequence of events that led to the granting of the 1908 permit Interior first instructed Mutual's predecessor to apply under MIRA, but later informed it that it could apply under the Act of March 3, 1891, *supra*. (PB 23 n.36, 24 and 24 n.37) The 1914 contract as submitted by Mutual, was similar to the 1894 contract, which had been entered into pursuant to MIRA, and would have required Indian consent. (See NJA 1330-37) Interior deleted the Indian consent provision. (JA 20-21)

Any failure to mention MIRA in connection with the FPA is not surprising. The FPA gave the Commission exclusive authority to license the use of Indian lands for federal power projects (PB 32 n.44) and did not require Indian consent.

[23]In discussing an application under both the Act of March 3, 1891, *supra*, and the Act of May 14, 1896 (43 U.S.C. section 957), Interior stated:

> "The two acts . . . are so different in the character of estate or permission therein provided for, as well as in the uses to which the right-of-way may be devoted and the extent to such right of way, that no permission or grant can be sanctioned which is based upon the two acts. The permission granted must rest either upon one act or the other." (24 Int. Land Dec. at 560-61)

II.
INTERIOR'S CONDITIONS ARE NOT MANDATORY.

A. Section 4(e)'s Conditions Proviso Cannot Be Read in Isolation.

There is a tension between the FPA's goal of hydro-power development and the need to protect various reservations.[24] Section 4(e) requires the Commission to find that a project will not interfere or be inconsistent with the purposes of the reservation it is located "within." It also states that a license "shall be subject to and contain" conditions that the "Secretary" responsible for the reservation deems necessary for its protection. The tension cannot be resolved by blindly stating that this language must be applied literally.[25]

Amici NWF describe the Commission's 4(e) "findings" as "a go/no-go decision on the project." (NWF B 9) They concede that Congress withheld veto power from the agencies, but argue that it allowed them to specify mitigation measures. (*Ibid.*) Petitioners agree that Congress allocated roles to both the Com-

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[24]The contentions that Congress' "overriding" (IB 24-25), "primary" (BB 16-18) and "paramount" (IB 23) purpose in enacting the FPA was to protect Indian and other reservations are wrong. Congress' overriding purpose was hydro-power development. See *Chemehuevi, supra*, 420 U.S. at 404-05; *Federal Power Comm'n. v. Union Electric Co.* (1965) 381 U.S. 90, 98-101; see also Pinchot, "The Long Struggle for Effective Federal Water Power Legislation," 14 Geo. Wash. L. Rev. 9 (1945). The protection of Indian (PB 14-15, remarks of Senators Nelson, Walsh and Meyers) and other reservations (PB 36, remarks of Lawson) was subordinate. (See also discussion, *supra*, n.7)

[25]It is a "familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." (*United Steelworkers of America v. Weber* (1979) 443 U.S. 193, 201, quoting *Holy Trinity Church v. United States* (1892) 143 U.S. 457, 459.) *See also, Chemehuevi, supra*, 420 U.S. at 403 (Court criticized Indian reliance on literal language of section 4(e)); cf. "Words are not pebbles in alien juxtaposition." (*NLRB v. Federbush Co.* (1941 2d Cir.) 121 F.2d 954, 957).

mission and Interior.[26] What NWF, Interior and the Bands refuse to recognize is that if the conditions are mandatory, the Commission's role is destroyed.

Here, the Commission solicited, carefully considered, and adapted Interior's conditions.[27] (PA 143-55) It found that the project *as conditioned by it* would not be inconsistent or interfere with the Bands' reservations. (PA 174, 176) Interior disagreed with the Commission's inconsistency/non-interference findings (PA 137) and in effect, insisted that its conditions were necessary to such a finding. To make Interior's conditions mandatory would place the inconsistency/non-interference decision with Interior, and usurp the Commission's section 4(e) role. (See APPA B 10 n.17) Moreover, if the Commission were forced to accept Interior's conditions — conditions designed to make the Projects' operation resemble that under the non-power license or recapture alternative (see JA 300) — its section 10(a) role also would be usurped. (See PB 41-42) This would return hydro-power to its

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[26]The balance struck by section 4(e) is similar to that in section 10(e). (*See, Montana Power Co. v. Federal Power Comm'n* (1972 D.C. Cir.) 459 F.2d 863, 874, *cert. denied* (1972) 408 U.S. 930; EEI B 14-15)

Interior (IB 20 n.23) and NWF (NWF B 11-14) make much of the fact that under section 30(c), the Commission has indicated that in granting exemptions it will not review conditions imposed by Wildlife Agencies. (*See, e.g., Swanson Mining Corp.* (1982) 20 FERC (¶ 61,229). However, that does not mean that the Commission abrogates its responsibilities to determine if the condition is environmentally related. (*Ibid.*) Also, once a project is exempt it no longer is under Commission jurisdiction and any conflicts between the Commission and the agency are minimized. Moreover, if the conditions imposed on the exemption are too burdensome, the applicant may always apply for a license.

Interior's discussion (IB 19-20) of sections 4(e), 11(a) and 18 is unavailing. These sections merely permit the Commission to draw on the technical expertise of other agencies.

[27]Interior (IB 32-36) cannot significantly distinguish the many Commission cases (PB 37-38; EEI B 12 n.12; FERC B 33) in which the Commission rejected or modified various secretarial conditions.

pre-FPA days when power development was subject to the discretion of the various secretaries.[28]

This case presents a worst-case scenario. If the Commission can be forced to accept Interior's conditions — conditions designed to destroy the project (JA 300) — it will have to accept every condition prepared by any secretary in the future, no matter how irrational or parochial. The clock will be turned back to the pre-FPA days when the nation's water power development foundered. (See PB 32 n.43)

B. An Interior Veto Is Unworkable.

The mandatory inclusion of Interior's conditions creates a dual authority — the Commission and Interior. Such dual authorities are "unworkable". (*First Iowa Hydroelectric Coop. v. Federal Power Comm'n* (1946) 328 U.S. 152, 168).

It makes judicial review unfeasible. Respondents (IB 38; BB 26) argue that secretarial conditions would be reviewable under section 313(b). Section 313(b)'s substantial evidence test, however, necessitates an evidentiary hearing. (*See, e.g., Citizens to Preserve Overton Park, Inc. v. Volpe* (1971) 401 U.S. 402, 414.) Under the FPA only the Commission can conduct evidentiary hearings. Interior's conditions were arrived at in strategy sessions (NJA 1639-40) with the Bands and submitted in advocate form with argumentative "reasons" for their imposition. (JA 49-61) Interior conducted no evidentiary hearings, made no findings of fact, and created no record on which appellate review can be based. In fact, Respondents argued that imposition of the conditions was within Interior's sole discretion (JA 40) and did not

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[28]In quoting O.C. Merrill (IB 25), Interior carefully omits his statement: "A coordinate administration of the water power activities of the three Departments . . . *will give* power users *one authority* instead of three with which to deal." (JA 371)

require separate witnesses or testimony.[29] (JA 62-63) To contend that nevertheless Interior's conditions should be subject to the "substantial evidence test" (BB 26; IB 38) or an "arbitrary and capricious" standard (NWF B 18) verges on "Newspeak." (*See* G. Orwell, *1984* (1949 Harcourt Brace & Co. Ed.) 303-314.)

The practical problems of holding that Interior's conditions are mandatory are legion.[30] (APPA B 16-23) The more one contemplates it, the more unworkable the mandatory inclusion of Interior's conditions become.[31]

C. An Interior Veto Would Be Inappropriate in This Case.

1. Making Interior's Conditions Mandatory Would Violate Petitioners' Right to Due Process.

Interior wants to be the initial arbiter with respect to whether its own conditions are reasonable; however, here Interior was a competing applicant recommending federal takeover (PA 70-71),

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[29]Interior's actions belie its statement: "conditions cannot be imposed arbitrarily [and] must be reasonable and supported by the evidence on the record." (IB 37)

Contrary to its contention (IB 37 n.39), the Commission, by finding that the license *as conditioned by it* would not interfere or be inconsistent with the Bands' reservations (PA 174, 176), necessarily found that the rejected conditions were *not* reasonably necessary to protect the reservations.

Although Petitioners opposed Interior's conditions on the grounds that they were beyond the Commission's jurisdiction, they were never accorded an evidentiary hearing with respect to the formulation of and need to impose them. The colloquy with Interior officials (JA 105-201) where no cross-examination was permitted (*see* JA 106) did not take the place of an evidentiary hearing. Moreover, Section 313(b) does not prescribe any standard for review of the Secretary's conditions. It is obvious that Congress envisioned that the Commission would decide all matters and review would be had from its decision.

[30]Does it make any sense to require the Commission to include conditions that are unlawful (APPA B 17-18, PA 151); beyond its jurisdiction (PA 148); impossible (PA 149); incompatible with its findings of fact (APPA B 19-20); or superseded by or in conflict with its own conditions? (PA 146; FERC B 19 n.25; PA 143)

[31]As Justice Jackson said, "I give up. Now I realize fully what Mark Twain meant when he said, 'The more you explain it, the more I don't understand it.' " (*Securities & Exchange Comm'n v. Chenery Corp.* (1947) 332 U.S. 194, 214 (dissenting opinion))

and construed its trust responsibility to the Bands so broadly as to preclude it from any reasoned, objective decision on the reasonableness of or need for the conditions it proposed.[32]

The parties before the Commission "are entitled to . . . a full hearing in conformity with the fundamental concepts of fairness." (*Shell Oil Co. v. Federal Power Comm'n* (1964 3d Cir.) 334 F.2d 1002, 1012) "When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality." (*Wong Yang Sung*

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[32]Interior lost all pretense of fairness when Mr. Chambers, its spokesman, stated:

> "[W]hatever happens in the [District Court], we have made an administrative determination by the Department of Interior as to what is necessary under the terms of the statute to adequately protect and utilize these reservations." (JA 176)

Later Chambers admitted:

> "[Interior's] trust responsibility to Indians . . . may preclude the kind of fairness, the kind of balancing of interests that normally goes on in the political process." (JA 182)

When the ALJ suggested an informal conference with Interior over the proposed conditions (JA 200), Chambers replied:

> "I think . . . bedrock legal questions . . . separate us. . . . [T]he department is not going to . . . recede from the basic trust responsibility we feel we have here, and it may ultimately be that our conception of that responsibility is that it does require more water than they can surrender and economically operate the project." (*Ibid.*)

Thus, Interior ignored the teaching of one of its own texts. On page 2 of the Introduction to *Federal Indian Law* (1958 Dept. of Int.) are the following words:

> "[N]othing could be more destructive of good will or more inimical to the advancement of which Indians are known to be capable than an immoderate accentuation of the idea that the United States Government is under a special obligation to all citizens who have Indian blood as a distinct class because of real or fancied injustices to their ancestors. In this connection it should be noted that there is a tendency to emphasize the obligations of the Government of the United States as trustee of the Indians and their rights. There is a related tendency in so doing to minimize the fact that it is also trustee of the rights of all the citizens and nationals of the United States."

v. McGrath (1949) 339 U.S. 33, 50) To give Interior the initial determination respecting the need for and reasonableness of its proposed conditions would violate fundamental notions of fairness. This very concern prompted the ALJ to respond to Interior's insistence that its conditions be imposed exactly as propounded:

> "[T]he judge of this case, the decider of this case, is one of the litigants, the Secretary . . . . How can the parties on both sides feel they are fairly treated when it turns out that the judge is the opposition party? That part worries me, and I can't quite see the answer." (NJA 1638)

The answer is to give the Commission the initial determination as to which of Interior's conditions are reasonably necessary to protect the Bands' reservations. (PA 41, Judge Anderson) The Commission's decision is more properly entitled to a presumption of validity on judicial review than a decision by an agency who is not only an adversary party to the proceedings, but whose trust responsibilities by its own admission preclude it from being fair and impartial.[33]

2. Interior's Conditions Are Not Mandatory on Relicensing.

The Bands note, "[t]his case arises under the relicensing[34] provisions of the . . . FPA" (BB 2) but argue that section 4(e) nevertheless applies. (BB 19 n.10) Their argument begs the ques-

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[33]Contrary to NWF's contention (NWF B 19), Petitioners do not desire "two bites at the apple"; Petitioners merely desire a fair first bite at the apple along with Respondents before a neutral tribunal — the Commission. (Cf. *Montana Power Co. v. Federal Power Comm'n* (1970 D.C. Cir.) 445 F.2d 739, 754, *cert. denied* (1971) 400 U.S. 1013 (The Commission, unlike Interior, has "broad stewardship over various aspects of the public interest . . . [including] the function and capacity for fair treatment of individual parties before it, whether licensees or *Indian* landlords."))

[34]Petitioners agree with the Bands that this is a relicensing. They respectfully disagree with the Commission who stated that it was "partly an initial licensing . . . partly a relicensing." (PB 43 n.51) Contrary to Amici (NWF B 4 n.6) the scope of the Project has not substantially changed. The canal was placed in operation in 1895 (PA 51), the powerhouses were completed in 1915-16 (PA 53), and Henshaw Dam in 1922. (PA 58) Prior to issuing the license the Commission knew that the Project would be used to convey Henshaw water. (PA 59) The last major modifications occurred in the late 1920's and were covered by license amendments. (PA 61)

tion. Regardless of whether section 4(e) is "an existing law," the question remains as to whether it is an *applicable* existing law. Section 15(a)'s legislative history[35] and the Commission's interpretation (see *Pacific Gas & Electric Co.* (1975) 53 FPC 523, 526) indicate that it is not. (See PB 42-44)

Notwithstanding contrary *dicta* (EEI B 17 n.18) in *Lac Courte Oreilles Band v. Federal Power Comm'n* (1975 D.C. Cir.) 510 F.2d 198, 210-11, Congress could not have intended that a useful project originally found not to interfere with a reservation, could be destroyed on relicensing by the forced imposition of new unworkable secretarial conditions.

Interior's assertion that Petitioners cannot raise the applicability of section 4(e) under section 15(a), because they did not petition for rehearing on that issue (IB 21 n.24), is wrong. Section 313(b) allows an issue to be raised before a Court, although not raised below, where "there is a reasonable ground for failure to do so." Here, Petitioners reasonably believed they were not "aggrieved" and thus neither required nor entitled to seek rehearing on that issue.[36] (§313(a)) That issue is not moot in this Court.

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[35]*See, e.g.*, Merrill's October 1917 Memorandum on Water Power Legislation (JA 369) noting that when a license is renewed, it should be "with such conditions as the public interests may then require." No mention is made of the section 4(e) reservation proviso. Furthermore, the language of the last proviso of section 15(a) indicates that Congress intended that new licenses be issued on "reasonable terms".

[36]The Commission's express refusal to decide whether section 4(e) applied on relicensing (PA 137 n.136) made it unclear whether Petitioners were an aggrieved party with respect to that issue. (See *Southern Union Gas Co. v. Federal Power Comm'n* (1976 D.C. Cir.) 536 F.2d 440, 442 n.4) Although the Commission imposed certain conditions, Petitioners reasonably believed that they were imposed under sections 10(a) and (g) (see PA 143; 173-75; 176) which apply on relicensing, as opposed to section 4(e) which does not. (See *Kansas Cities v. Federal Energy Regulatory Comm'n* (1983 D.C. Cir.) 723 F.2d 82, 86) Moreover, the conditions which Interior believes should have been made mandatory under section 4(e) were not imposed by the Commission. It was not until the Ninth Circuit held such conditions mandatory under section 4(e) that Petitioners were adversely affected by the Commission's holding. (*Ibid.*)

3. Interior's Conditions Are Not Mandatory for Minor Projects.

Project No. 176 is a minor project (PA 69 n.49) and the Commission has the power under section 10(i) to waive Interior's 4(e) conditions. (PA 137) Interior's statement that "the Commission expressly refused to waive the Section 4(e) requirements in this case . . . ." (IB 23)[37] misses the point. The very fact that the Commission had the power to waive Interior's conditions, regardless of whether it chose to do so, makes it absurd for Respondents to contend that the conditions are mandatory in this case.

III.
INDIAN WATER RIGHTS ARE NOT A "RESERVATION" FOR SECTION 4(e) PURPOSES.[38]

Respondents strain mightily (IB 39-40; BB 28-29), but cannot explain away the FPA's express language which shows that Congress did not intend "Indian water rights" to be a "reservation" for section 4(e) purposes. They ignore Congress' uses of geographical limiters, *e.g.*, "upon" and "within" in section 4(e), to confine the Commission's licensing authority. (PB 44-45)[39] (*See, e.g., Reiter v. Sonotone* (1979) 442 U.S. 330, 339 (In

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[37]The Commission's refusal to invoke section 10(i) is understandable in light of its longstanding interpretation of 4(e) as not mandating the inclusion of all secretarial conditions. When the Commission exercised its discretion not to invoke 10(i)'s waiver, it also exercised its discretion to reject some of Interior's conditions as unreasonable. Whether reviewed as a rejection under section 4(e) or a constructive waiver under section 10(i) the result is the same.

[38]Interior states that Judge Anderson agreed that section 4(e) applies to downstream reservation water rights. (IB 39 n.41) In fact, Judge Anderson concluded that "*FERC* properly interpreted and applied section 4(e) and that *all* its findings in that regard are supported by substantial evidence." (PA 41)

[39]*See* also, section 23(b) referring to "works . . . *upon* any part of the . . . reservations . . . ." By noting that in a later portion of section 23(b) Congress also used the words "if no . . . reservations are affected" (IB 40; BB 28), Respondents merely show that Congress knew how to use such words. Congress *did not* use those words in section 4(e).

construing a statute, Courts should, if possible, give effect to every word Congress used.))

That "Indian water rights" might constitute "an interest in land" or "a reservation" under other circumstances (PA 26) is irrelevant. (*Federal Power Comm'n v. Tuscarora Indian Nation* (1960) 362 U.S. 99, 111) For purposes of section 4(e), Congress intended to confine the term "reservations" to *lands* owned by the United States or in which it owns a property interest. (*Id.* at 114)

Even if "Indian water rights" were within the literal terms of section 4(e), that would not end the inquiry. (*See, Chemehuevi Tribe of Indians, supra*, 420 U.S. 395 (Court held thermal electric power generating plants not subject to licensing jurisdiction even though they literally qualified under section 4(e)) When 4(e) is read together with the rest of the Act, as it must be (*Id.* at 403), it is clear that "water rights" were treated separately (see §27) and the Commission was denied jurisdiction over such rights. (*See* PB 39, 40; FERC B 31 n.36, 37 n.41; APPA B 26-29; *see also*, EEI B 21) Nor is there any suggestion in the legislative history that "Indian water rights" were intended to be a "reservation" for section 4(e) purposes. This analysis is reinforced by the Commission's consistent administrative interpretations. (PB 45)

In any event, there is no reason to strain the meaning of the FPA to include Indian water rights. They will be fully protected by the District Court. (*See Winters v. United States* (1908) 207 U.S. 564).[40]

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[40]After the District Court determines the water rights, it can enforce them. However, as recently as August 1980, it denied motions brought by Respondents to require Petitioners to release additional water from Henshaw. It found: "The United States and the Indian Bands have failed to establish that they have a present, actual need for additional releases of water." (Copies of the District Court's August 1980 Order, Findings and Conclusions are lodged with the Clerk of the Court.)

CONCLUSION.

When Congress passed the FPA, its overriding purpose was to foster hydroelectric development. If the Ninth Circuit's Decision is not reversed, not only will Petitioners be harmed, but this Congressional intent will be frustrated.

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Respectfully submitted,

PAUL D. ENGSTRAND,
DONALD R. LINCOLN,
HENRY E. HEATER,
JENNINGS, ENGSTRAND & HENRIKSON,
A Professional Law Corporation,
JOHN R. SCHELL,
KENT H. FOSTER,
GLENN, WRIGHT, JACOBS & SCHELL,
C. EMERSON DUNCAN II,
DUNCAN, ALLEN & MITCHELL,
Attorneys for Petitioners.